

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:F:BOS:POSTF-119568-02
BJLaterman

date: 6/7/02

to: Michel Morency, Revenue Agent
LMSB: Group 1327

from: Associate Area Counsel, Boston
CC:LM:FS:BOS

subject: [REDACTED], Inc. & Subsidiaries
Forms 872
Taxable Years [REDACTED] and [REDACTED]

This memorandum responds to your request of March 21, 2002, that we give advice regarding extending the statute of limitations for the above-mentioned consolidated group's taxable years [REDACTED] and [REDACTED]. This memorandum should not be cited as precedent.

[REDACTED], Inc. was a Delaware corporation which was the parent corporation of an affiliated group of corporations. Said group filed consolidated federal income tax returns for their [REDACTED] and [REDACTED] taxable years.

[REDACTED], Inc. is a Delaware corporation. [REDACTED] Corp, a Delaware corporation, was a wholly owned subsidiary of [REDACTED], Inc. On [REDACTED], [REDACTED], Inc., [REDACTED], Inc. and [REDACTED] Corp. entered into an Agreement and Plan of Reorganization. Pursuant to the Agreement and Plan of Reorganization, [REDACTED] Corp. merged with and into [REDACTED] Inc. with [REDACTED], Inc. as the surviving corporation. As the result of the merger, [REDACTED], Inc. became a wholly owned subsidiary of [REDACTED], Inc.

On or about [REDACTED], [REDACTED], Inc.¹ merged into [REDACTED], Inc. with [REDACTED], Inc.

¹It is noted that the Certificate of Ownership and Merger refer to [REDACTED], Inc. It is our assumption that [REDACTED], Inc. and [REDACTED], Inc. are the same corporation.

as the surviving corporation. You are seeking to extend the statute for the [REDACTED] and [REDACTED] taxable years of [REDACTED], Inc. & Subsidiaries.

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters related to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each subsidiary. Treas. Reg. § 1.1502-77(a). Thus, generally the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(a). Treas. Reg. § 1.1502-77(c) provides that, unless the District Director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect to the tax for a consolidated return year, shall be applicable to each corporation which was a member of the group during any part of such taxable year. The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a).

Temp. Reg. § 1.1502-77T provides exceptions to the general rule. Temp. Reg. § 1.1502-77T provides for alternative agents in certain circumstances and applies to waivers of the statute of limitations for taxable years for which the due date (without extensions) of the consolidated return is after September 7, 1988. Therefore, the regulation is applicable in this case. Temp. Reg. § 1.1502-77T provides that a waiver of the statute of limitations with respect to the consolidated group given by any one or more corporations referred to in paragraph (a)(4) of the section is deemed to be given by the agent of the group.

Subparagraph (a)(4)(i) lists as an alternative agent the common parent of the group for all or any part of the year to which the notice or waiver applies. In this case, the common parent, [REDACTED], Inc., was merged into [REDACTED], Inc. on [REDACTED] and is no longer in existence. Therefore, this paragraph does not apply.

Subparagraph (a)(4)(ii) lists as an alternative agent a successor to the former common parent in a transaction in which I.R.C. § 381(a) applies. I.R.C. § 381(a) applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which I.R.C. § 361 (relating to non recognition of

gain or loss to corporations) applies, but only if the transfer, is in connection with a reorganization described in subparagraph (A), (C), (D), (F) or (G) of I.R.C. § 368(a)(1). On [REDACTED], [REDACTED], Inc. merged into [REDACTED], Inc. with [REDACTED], Inc. surviving. If the merger is an "A" reorganization, I.R.C. § 381 will apply to the merger. If so, pursuant to Temp. Reg. § 1.1502-77T(4)(ii), [REDACTED], Inc. would be an alternative agent for the [REDACTED], Inc. consolidated group for the tax years [REDACTED] and [REDACTED].

Any waiver given by [REDACTED], Inc. with respect to those pre-merger years of the [REDACTED], Inc. consolidated group would be deemed to be given by the agent of the group. Therefore, you should confirm that the downstream merger of [REDACTED], Inc. into [REDACTED], Inc. is a transaction to which I.R.C. §381 applied.

Both [REDACTED], Inc. and [REDACTED], Inc. are Delaware corporations. In this case since the merger was effected under Delaware law, [REDACTED], Inc. is primarily liable for [REDACTED], Inc. debts, including taxes due. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387 (1985), later proceeding, 90 T.C. 771 (1988). Section 259 of the Delaware General Corporation Law provides in part,

(a) When any merger or consolidation shall become effective under this chapter, ... all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

DEL. CODE ANN. tit. 8, § 259 (1991).

Accordingly, [REDACTED], Inc. is a successor in interest by merger to [REDACTED], Inc.

Based on the foregoing discussion, we recommend that you obtain a Form 872 from [REDACTED], Inc. We recommend that the caption on the Form 872 read: [REDACTED], Inc.(EIN)successor in interest by merger to [REDACTED], Inc.(EIN)

and alternate agent for the [REDACTED], Inc. (E.I.N.) consolidated group.* On the bottom of the form, you should add the following: *This is with respect to the consolidated tax of the [REDACTED], Inc. consolidated group for its taxable years [REDACTED] and [REDACTED].

This Form should be signed by an authorized officer or director of [REDACTED], Inc. Rev. Rul. 83-41, 1983 C.B. 399, clarified and amplified by, Rev. Rul. 84-165, 1984-2 C.B. 305.

In addition, under I.R.C. § 6901, [REDACTED], Inc. is a transferee at law of [REDACTED], Inc. because [REDACTED], Inc. received the assets of [REDACTED], Inc. when it merged into [REDACTED], Inc. A determination against the surviving corporation for tax due by the merged corporation for a period prior to the merger is not generally handled as a transferee case, rather it should generally be handled by asserting primary liability against the surviving corporation. There is an exception if the statutory period for assessing a deficiency has expired under primary liability; the Service would then argue that the surviving corporation should be liable as a transferee. See generally CCDM (35)(10)61. Therefore, it is preferable to assert primary instead of transferee liability against the surviving corporation, [REDACTED], Inc, if the statutory period for assessing a deficiency has not expired under primary liability. The transferee liability approach should be reserved for the situation where time for asserting primary liability has expired. Since the statutes for [REDACTED] and [REDACTED] have not expired, it would not be appropriate to use the transferee liability approach in this case.

As a final matter, we recommend that you pay strict attention to the rules set forth in the Internal Revenue Manual (IRM). Specifically, IRM 121.2.22.3 requires use of Letter 907(DO) to solicit the Form 872, and IRM 121.2.22.4.2 requires use of Letter 929(DO) to return the signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed Form 872 is received from the taxpayer the authorized manager should promptly sign and date it in accordance with Treas.Reg. §301.6501(c)-1(d) and IRM 121.2.22.3. The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event that Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, please note that §3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. §6501(c)(4)(B), requires the Internal Revenue Service to advise taxpayers of their right to refuse to extend the limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Internal Revenue Service requests that the taxpayer extend the limitations period. To satisfy the requirement, Publication 1035, "Extending the Tax Assessment Period," must be given when you solicit the statute extension.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as attorney client privilege. If disclosure becomes necessary, please contact this office for our views. If we can be of any further assistance, the undersigned can be reached at (617) 565-7855.

BARRY J. LATERMAN
Special Litigation Assistant